87-1983

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATHANIEL JOHNSON, JR.
PRIVATE, UNITED STATES ARMY, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

JOHN T. EDWARDS
Colonel, JAGC
Chief Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
Nassif Building
Falls Church, Virginia 22041
(703) 756-0583
Counsel of Record

JOEL D. MILLER
Lieutenant Colonel, JAGC
Appellate Defense Counsel

MARION E. WINTER
Major, JAGC
Appellate Defense Counsel

WILLIAM J. KILGALLIN
Captain, JAGC
Appellate Defense Counsel

2408

QUESTION PRESENTED

Whether the provisions of Articles 16(1)(A) and 52(a)(2) of the Uniform Code of Military Justice violate the Due Process Clause of the Fifth Amendment by failing to require a unanimous verdict from a court-martial of at least six members.

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v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Nathaniel Johnson Jr., respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals, rendered without oral argument, is reported at Docket No. 59,438, ____ M.J. ____ (C.M.A. April 4, 1988), and is reprinted at Appendix A. The decision of the Army Court of Military Review is unreported, ACMR 8700268 (A.C.M.R. Nov. 30, 1987) (unpub.) and is reprinted at Appendix B.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1986).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: No person . . . shall be deprived of liberty or property, without due process of law.
>
> Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury.

The Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 801 *et seq.* (1982 and Supp. IV 1986) provides:

> Article 16: The three kinds of courts-martial in each of the armed forces are-(1) general courts-martial, consisting of (A) a military judge and not less than five members.
>
> Article 52(a)(2): No person may be convicted of any other offense, except as provided in section 845(b) of this title (Article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.
>
> Article 52(b)(2): No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

Statement of the Case

On December 5, 1986, petitioner was lured out of his room on the pretense of a telephone call. Once in the hallway, the lights were turned off and petitioner was beaten by a group of soldiers. Petitioner subsequently returned to his room and obtained a knife. He then returned to the hallway and confronted one of his attackers, Sergeant Britton. In the course of that confrontation, Sergeant Britton was fatally stabbed (R. 171-175). On February 4 and 5, 1987, petitioner was tried at Fort Eustis, Virginia, before a general court-martial composed of officer members. Contrary to his pleas, he was found guilty of premeditated murder (noncapital) and violation of a lawful general regulation in contravention of Article 118 and

92, UCMJ, 10 U.S.C. §§ 918 and 892 (1982), respectively. Petitioner was sentenced to a dishonorable discharge, confinement for the rest of his natural life, forfeiture of all pay and allowances and reduction to Private (E-1). The convening authority approved the sentence pursuant Article 60, UCMJ, 10 U.S.C. § 860.

After *voir dire* and challenge of court members, the panel in petitioner's court-martial consisted of five officer members. Before trial on the merits began, petitioner's defense counsel objected to a court composed of only five members. The military judge overruled the objection (R. 91). Defense counsel subsequently requested that if the members found petitioner guilty of premeditated murder, the military judge should determine whether the vote on findings was unanimous (R. 317-318). This request was also denied (R. 323). The constitutional question involved was litigated at trial and at every stage of the appellate process. The issue granted by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN PERMITTING APPELLANT TO BE TRIED FOR PREMEDITATED MURDER BY A COURT-MARTIAL COMPOSED OF ONLY FIVE MEMBERS AND IN FAILING TO DETERMINE IF THE FINDINGS WERE UNANIMOUS.

REASONS FOR GRANTING THE WRIT

Petitioner has been condemned to spend the rest of his natural life in confinement by a process which has been deemed inherently suspect and constitutionally infirm for every jurisdiction in the United States, save one. This Court has held that a five-member jury is unconstitutional *per se* and that findings of a six member jury must be unanimous. Petitioner was convicted of premeditated murder and mandatorily sentenced to life imprisonment by a nonunamious five-member jury.

The basis upon which military courts have distinguished a soldier's due process protections from those afforded every other American citizen has been vitiated by the Court's decision in *Solorio v. United States*, ____ U.S. ____, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987). In *Solorio*, the Court greatly expanded court-martial jurisdiction and expressly declined to consider the issue of a due process claim since such had not been raised at the Court of Military Appeals. 107 S.Ct. at 2933, n.18. Petitioner's due process claim has been litigated at every stage of trial and appeal and offers this Court the opportunity to establish the basic parameters of minimum due process in military criminal jurisdiction.

I.

PETITIONER HAS STANDING TO CLAIM THAT THE PROVISIONS OF ARTICLE 52(a)(2), UCMJ, VIOLATE HIS DUE PROCESS RIGHTS.

Article 51(a), UCMJ, 10 U.S.C. § 851(a), requires that the members of a court-martial vote on findings by secret written ballot. The votes are counted by the junior member and checked by the president, who is the senior member. Article 52(a)(2), U.C.M.J., 10 U.S.C. § 852(a)(2), requires that only two-thirds of the members need concur in order to render a guilty verdict. *See also Manual for Courts-Martial, United States, 1984* [hereinafter *M.C.M., 1984*], Rules for Courts-Martial [hereinafter R.C.M.] 921. "Except as provided in Mil.R.Evid. [*Military Rule of Evidence*] 606, members may not be questioned about their deliberations and voting." R.C.M. 922(e), *MCM, 1984*. Thus, polling of court-martial members is prohibited. As a result, petitioner was denied the opportunity to ascertain the numerical composition of the verdict on findings.

The Article and Rule for Court-Martial requiring a secret ballot, in effect, insulate Article 52(a)(2), UCMJ, from due process scrutiny. Petitioner submits that the secret ballot provisions were never intended to permit this result. Rather, secret balloting was intended to shield the court-martial members from unlawful command influence. Congress has

long been concerned that court-martial members may be subject to unlawful command influence. *See* Hearings on H.R. 2498 before a Subcommittee of the Committee on Armed Services, 81st Cong. 1st Sess. 628, 640-641, 825-26, and 1075 (1949); Report of War Department Advisory Committee on Military Justice, 6-7 (1946) (committee investigated commander's control of courts-martial during World War II and concluded that it was necessary to limit commanders' influence of court-martial members). Legislation designed to protect court-martial members from unlawful command control should not now be allowed to deny petitioner an opportunity to litigate a question of fundamental due process.

Petitioner should not be denied standing because the numerical composition of the verdict was not preserved for appeal. This is especially true since petitioner made a timely motion to determine whether the verdict was in fact unanimous. Accordingly, this Court should presume that petitioner's verdict was less than unanimous and that petitioner suffered prejudice. *Cf. Mendrano v. Smith,* 797 F.2d 1538, 1540 n.1 (10th Cir. 1986) ("Since, as required by the Uniform Code of Military Justice the court-martial voted by secret ballot, our record does not reveal the number of votes for conviction. However, we consider the two-thirds rule's validity because it did apply to this trial and assume only two-thirds, or four members of the court-martial voted for conviction").

II.

THE PROVISIONS OF ARTICLES 16(1)(A) AND 52(a)(2), UCMJ VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY FAILING TO PROVIDE A UNANIMOUS VERDICT FROM A COURT-MARTIAL OF AT LEAST SIX MEMBERS.

A. *Minimum Due Process Requires a Unanimous Verdict of at Least Six Members.*

The Due Process Clause requires a unanimous verdict of a six member fact-finding body in any non-petty criminal pros-

ecution. In *Burch v. Louisiana*, 441 U.S. 130 (1979), the Court held that a less than unanimous verdict from a six-member jury was unfair and unconstitutional. *Citing Ballew v. Georgia*, 435 U.S. 223 (1978) (five-member jury is unconstitutional *per se*). In *Ballew*, the Court stressed that at "some point, [the] decline in jury size leads to inaccurate fact-finding and the incorrect application of the common sense of the community to the facts." *Ballew*, 435 U.S. at 232. Accordingly convictions, where unanimity is not required of fact-finding bodies composed of six or fewer members, are unfair and violate due process.

In *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985), the Court reasoned, "[t]he State's interest in prevailing at trial – unlike that of a private litigant – is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases." The same compelling interest in ensuring accurate findings of fact applies to the parties in courts-martial.

B. *Due Process in the Military Context Does Not Justify Less Than a Unanimous Six Member Verdict.*

Courts-martial have not been subject to the jury trial demands of the Constitution. *United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986). The Due Process Clause nevertheless requires that criminal trial procedures foster accurate fact-finding and fundamental fairness. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971). Military members accused of crimes and the Government of the United States share a compelling interest in the accurate disposition of criminal charges. *Cf. Ake v Oklahoma*, 470 U.S. at 79.

To facilitate fact-finding at general courts-martial, Congress has provided that such courts, designed to dispose of non-petty offenses, consist of "not less than five members." Art. 16(1)(A), UCMJ, 10 U.S.C. § 816(1)(A). In a noncapital case, only two-thirds of such members need concur in a finding of guilty. Art. 52(a)(2), UCMJ, 10 U.S.C. § 852(a)(2). On the other hand, both Congress and the President have required a higher standard for findings in capital cases. When the death penalty is mandatory, the findings of "not less than

five members" must be unanimous. Art. 52(a)(1), UCMJ, 10 U.S.C. § 852(a)(1). The President, acting under statutory authority, has recently provided that the non-mandatory imposition of the death penalty may be considered only after the entry of unanimous findings. R.C.M. 1004(a)(2), *MCM, 1984*.[1] Neither Congress nor the President has required unanimous findings for noncapital premeditated or felony murder, the two findings for which Congress has nonetheless required the mandatory imposition of life imprisonment. Art. 118, UCMJ, 10 U.S.C. § 918. Accordingly, while the less stringent, nonunanimous findings of five members prevents the death penalty from being imposed on petitioner, such nonunanimous findings nevertheless provide the basis for imposition of a mandatory sentence to confinement for life.

The Congressional and Presidential procedures for findings and sentence at courts-martial recognize, at least for imposition of the death penalty, the well-established due process concept that the procedural protection afforded depends to a large extent upon the interests at stake.[2] They fail to acknowledge, however, the compelling interest of both petitioner and the United States that no accused, including petitioner, be found guilty of an infamous crime and be deprived of his liberty for the rest of his life on the basis of unreliable findings.[3] Thus, the deliberative process of petitioner's court-martial must be scrutinized under the test adopted to resolve criminal due process concerns. The test balances three factors.

> The first is the private interest that will be affected by the action of the State. The second is the governmental

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[1] This provisions became effective in February 1986. App. 21, R.C.M. 1004(a)(2), *MCM, 1984*.

[2] Congress also partially applies this concept by requiring a three-fourths rather than a two-thirds vote of the members for any sentence to confinement in excess of ten years. Art. 52(b)(2), UCMJ, 10 U.S.C. § 852(b)(2). The only exception to this rule is where mandatory life imprisonment is the minimum punishment.

[3] The court members are not instructed and may not consider that a verdict of guilty to premeditated murder *automatically* results in a sentence to life imprisonment in a noncapital case.

> interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Ake v. Oklahoma, 470 U.S. at 77.

Petitioner's private interest in the accuracy of the findings at trial, which placed his life and liberty at risk, is "uniquely compelling." *Ake v. Oklahoma,* 470 U.S. at 78. Such an interest weighs heavily in the balancing analysis. *Id.*

To weigh the second and third factors, it must be determined what additional or substitute procedural safeguards petitioner seeks. Petitioner objected to a court-martial of less than six members (R. 91). Petitioner relied, *inter alia,* on the sixth and fourteenth amendment holdings in *Ballew* and *Burch* that five-person as well as nonunanimous six-person juries may not constitutionally convict a defendant for a nonpetty criminal offense. Petitioner also relied on the Due Process Clause and the holdings of *Ballew* and *Burch* to the extent they are predicated upon due process concerns as well as sixth amendment considerations (R. 91).

A fact-finding body of only five persons, whether composed of private citizens or soldiers, produces results so unreliable as a matter of law that the Due Process Clause is violated. The Court reached this conclusion in *Ballew* based upon empirical data compiled after its decision in *Williams v. Florida,* 339 U.S. 78 (1970), upholding the use of a six-person jury. *Ballew* v. *Georgia,* 435 U.S. at 239. Relying on this data, the Court reached specific findings that:

> [P]rogressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate factfinding. The risk of convicting an innocent person . . . rises as the size of the jury diminishes . . . . [T]he verdicts of jury deliberation in criminal cases will vary as juries become smaller, and . . .

> the variance amounts to an imbalance to the detriment of one side, the defense . . . . [T]he presence of minority viewpoints [diminishes] as juries decrease in size. When the case is close, and the guilt or innocence of the defendant is not readily apparent [larger juries] will insure evaluation by the sense of the community and will also tend to insure accurate factfinding.

Ballew v. Georgia, 435 U.S. at 232-38. The evidence indicates that as the size of juries diminishes to five and below, the risk of conviction of innocent defendants increases. 435 U.S. at 234-35. Unanimity of five-person juries does not remedy the sixth amendment infirmities. A unanimous five-person jury cannot assure that the group engages in meaningful deliberation and truly represents the sense of the entire community. 435 U.S. at 241. Savings in time and money do not justify the State's interest in five-person juries. 435 U.S. at 243-44.

The Court relied on the same rationale in *Burch*:

> [M]uch the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a non-petty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous.

Burch v. Louisiana, 441 U.S. at 138. Once again, the Court rejected the State's justification that the use of nonunanimous six-person juries saved time and money. 441 U.S. at 139.

In the case *sub judice*, the military judge articulated the following justification for his ruling:

> [T]he objection is denied based on the fact that the Manual permits the five member court that is the minimum number in a General Court-Martial, of course

> such as we have today. In my opinion, this is not constitutionally impermissible.

(R. 92). This ruling ignores the specific language of Article 16, UCMJ, 10 U.S.C. § 816, one basis for due process in military courts. Further, it ignores the empirical data relied on in *Ballew*.

First, the jurisdictional requirement of Article 16, UCMJ, is for "not less than five members." Nothing in that language evidences a Congressional intent that there shall be no more than five members assembled as a general court-martial. Therefore, the statute in no way prohibited the military judge, in safeguarding fundamental fairness, from ordering the detail of additional members to assure accurate fact-finding where appellant was on trial for an infamous offense which mandates the loss of his liberty for the rest of his life.

Second, the provisions of the UCMJ do not alone define due process for courts-martial.

> Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress. But, this does not mean that we can not give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes.

United States v. Clay, 1 USCMA 74, 1 CMR 74, 77 (1951). Accordingly, even though petitioner may have no sixth amendment entitlement to trial by jury,[4] the requisites of

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[4] Petitioner asserts that all United States citizens are entitled to the explicit protections of the Bill of Rights, and his status as a soldier does not deprive him of the right to a jury "in all criminal prosecutions." It is clear that only the right to grand jury indictment is expressly denied to soldiers

due process for civilian trials give meaningful definition to the protections to be afforded petitioner. The Due Process Clause has always applied to court-martial procedure. *Burns v. Wilson*, 346 U.S. 137, 142-43 (1953). Further, the Court of Military Appeals has adopted the requirement that a party who urges a different rule than the one prevailing in the civilian community bears the burden of demonstrating that unique military conditions dictate the rule. *Courtney v. Williams*, 1 M.J. 267, 270 (CMA 1976).

Petitioner was entitled to evaluation of the facts by that sense of the community which would tend to insure accurate fact-finding. *See Ballew v. Georgia*, 435 U.S. at 238. Unanimity of six-person juries is required to ensure that a sense of the community stands between the zealous prosecutor or biased judge. *Burch v. Louisiana*, 441 U.S. at 135-37. In the military, there is even a greater need for procedural safeguards to stand against the zealous or biased military commander. Verdicts based on votes of 10-2, 9-3 and 6-0 are sufficient to serve this function. *See generally Apodoca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). Those based on votes of 4-1 or 4-2 are not. *Burch v. Louisiana*, 441 U.S. at 135-37.

The Army Court of Military Review has long considered the reasoning of this Court as enunciated in *Ballew* and *Burch* inapposite to trial by courts-martial. That court had relied on the very restrictive nature of court-martial jurisdiction to remedy the constitutional infirmities of courts-martial:

> It cannot be gainsaid that the military trial must be fair and impartial. *See e.g., United States v. Lamela*, . . . 7 M.J. [277] at 278: *United States v. Cleveland*, 6 M.J. 939, 942 (A.C.M.R. 1979). The trial is, however, by a unique, military tribunal that is essentially different from the jury envisioned by the Sixth Amendment. The composition of courts-martial is different, as the members are

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"when in actual service in time of war or public danger." U.S. Const. amend. V. An American soldier is neither an indentured servant nor a second-class citizen.

> drawn exclusively from the accused's own profession based on specified qualifications (one of which is judicial temperament), with specialized knowledge of the profession, and subject to only one challenge other than for cause. Their functioning differs, too. For example, it includes the questioning of witnesses and the determining of sentences. In view of such compositional and functional differences, the studies relied upon in *Ballew* and *Burch* are inapposite. *United States v. Wolff*, . . . 5 M.J. [923] at 925. The differences between the institution of courts-martial and the institution known as a jury have been recognized as necessary as well as constitutional. *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969). When the use of courts-martial has impinged on constitutional rights, the remedy has been to limit the exercise of their jurisdiction rather than to alter the nature of the tribunal, for courts-martial are not fundamentally unfair. *Gosa v. Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973).

United States v. Guilford, 8 M.J. 598, 602 (ACMR 1979), *pet. denied*, 8 M.J. 242 (CMA 1980). The bedrock of this legal reasoning has been rendered fatally flawed by this Court's decision in *Solorio*, 107 S.Ct. 2924, which expressly abandons any limitation on military jurisdiction over soldiers as set out in *O'Callahan v. Parker*.[5]

Further, while there is a compositional and functional difference between military jurors and their civilian counterparts, such does not excuse a denial of due process protections. Article 25, UCMJ, 10 U.S.C. § 825 requires convening authorities to appoint court members who are best qualified by reason of age, education, training, experience, length of service and judicial temperament. Rather than excuse nonunanimous verdicts, the extraordinary composition of military juries demands that anything less than a unanimous

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[5] Congress' decision to place military tribunals directly under Supreme Court scrutiny also evidences a congressional desire that military courts parallel civilian courts unless military necessity dictates the contrary. *See* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

six-member verdict be considered unreliable *per se*, since the opinion of one such "blue ribbon" military fact-finder must be given substantially *more credence* than the dissenting opinion of one civilian juror.

The size of a five-member court-martial alone renders group deliberation less effective. The risk of an erroneous conviction is still greater by virtue of the small size of the group. The variance in results still amounts to an imbalance to the detriment of the defense solely as a result of the group's small size. Five members do not adequately represent minority viewpoints; in close cases, five members do not provide the requisite sense of the community necessary to produce reliable results. Moreover, small groups of five members in the military are more easily subjected to the subtle pressures of unlawful command influence.

In addition to the safeguards found in the members' ability to ask questions and take notes, soldiers are entitled to the due process protection inherent in the requirements that courts-martial be composed of at least six members and that all six-member findings be unanimous.[6] A requirement of unanimity has the value of producing more accurate findings, as both Congress and the President have clearly acknowledged by their requirements of unanimity in capital cases.

Petitioner specifically seeks this requirement of unanimity of six members in at least all cases where confinement for life is mandatory upon a finding of guilty. No accused should be deprived of his liberty for life based upon findings which may be erroneous or generated by known infirmities. The procedural safeguards of assembling more than five members and requiring unanimity on findings are therefore absolutely essential.

Government interests are not adversely affected if these safeguards are provided. First, the appointment of a sufficient number of members in premeditated and felony murder cases to ensure the assembly of more than five members

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[6] The assembling of seven or more members, even without a requirement for unanimity in findings, would also satisfy constitutional concerns.

burdens the government little in terms of time or money. The assembly of six or more members is a common occurrence in courts-martial practice. General court-martial convening authorities have sufficient members within their jurisdiction from which to appoint court-martial members. Second, the government shares the same compelling interest of all military accused in producing accurate findings. *Ake v. Oklahoma*, 470 U.S. at 79. The government has no legitimate interest in the mandatory imposition of a sentence to life confinement against an accused who has been found guilty and sentenced to life imprisonment by an inherently suspect court-martial panel.

CONCLUSION

The military's mission of defending this country is without a doubt a most compelling state interest. Petitioner's interest in receiving a fair trial resulting in accurate findings of fact is equally compelling. There has been no showing that compliance with the basic due process rights expressed in *Burch* will in anyway harm the national defense. The perception of fairness and accurate verdicts can only enhance the morale and effectiveness of men and women in our Armed Forces. Thus, the two interests are neither inconsistent nor mutually exclusive and can coexist to promote an effective fighting force while maintaining the constitutional rights of its soldiers. Anything less than a minimum requirement for unanimous six-member verdicts clearly thwarts constitutional due process and fundamental fairness. In the absence of a clear and compelling national interest requiring otherwise, soldiers are entitled to the same accuracy from fact-finders in criminal trials as are all other citizens of the United States.

Respectfully Submitted,

JOHN T. EDWARDS
Colonel, JAGC
Chief Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
Nassif Building
Falls Church, Virginia 22041
(703) 756-0583
Counsel of Record

JOEL D. MILLER
Lieutenant Colonel, JAGC
Appellate Defense Counsel

MARION E. WINTER
Major, JAGC
Appellate Defense Counsel

WILLIAM J. KILGALLIN
Captain, JAGC
Appellate Defense Counsel

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 59438/AR
CMR Dkt. No. 8700268

UNITED STATES, APPELLEE

v.

NATHANIEL JOHNSON, JR. (214-72-8044), APPELLANT

ORDER

On consideration of the petition for grant of review of the decision of the United States Army Court of Military Review, we concluded that appellant's court-martial was convened and conducted in accordance with the Uniform Code of Military Justice. Accordingly, it is by the Court, this 4th day of April, 1988

ORDERED:

That said petition for review is granted on the issue raised by appellate defense counsel; and

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (KILGALLIN)
Appellate Government Counsel (HAUSKEN)

APPENDIX B

UNITED STATES ARMY COURT OF
MILITARY REVIEW

ACMR 8700268

UNITED STATES, APPELLEE

v.

PRVATE E-2 NATHANIEL JOHNSON, JR. (214-72-8044),
UNITED STATES ARMY, APPELLANT

United States Army
Transportation Center and Fort Eustis
J. R. HOWELL, Military Judge

For Appellant: Lieutenant Colonel Joel D. Miller, JAGC, Major Marion E. Winter, JAGC, Captain William J. Kilgallin, JAGC (on brief).

For Appellee: Colonel Norman G. Cooper, JAGC, Lieutenant Colonel Gary F. Roberson, JAGC, Captain Gary L. Hausken, JAGC (on brief).

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30 November 1987

DECISION

Before
DEFORD, KANE, AND SMITH
Appellate Military Judges

Per Curiam:

On consideration of the entire record, including consideration of the issue personally specified by appellant, we hold the

findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
WILLIAM S. FULTON, JR.
Clerk of Court

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No. 87-1983

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

NATHANIEL JOHNSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

NORMAN G. COOPER
Col., JAGC, USA
GARY F. ROBERSON
Lt. Col., JAGC, USA
PATRICK D. O'HARE
Capt., JAGC, USA
GARY L. HAUSKEN
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
Falls Church, VA 22041-5013

24pp

QUESTION PRESENTED

Whether Articles 16(1)(A) and 52(a)(2) of the Uniform Code of Military Justice, 10 U.S.C. (& Supp. IV) 816(1)(A) and 852(a)(2), violate the Constitution by permitting a defendant to be convicted by the two-thirds vote of a court-martial panel containing as few as five members.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals affirming petitioner's conviction (Pet. App. 1a) is reported at 26 M.J. 222. The order of the Army Court of Military Review (Pet. App. 2a-3a) is not officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 4, 1988. The petition for a writ of certiorari was filed on June 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was convicted by court-martial of premeditated murder and the unlawful possession of a murder weapon, in violation of Articles 118 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918 and 934. Petitioner was sentenced

to confinement for life, a reduction in pay grade, forfeitures of all pay and allowances, and a dishonorable discharge.[1] The convening authority reviewed the case and approved the sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 2a-3a). The Court of Military Appeals summarily affirmed (Pet. App. 1a).

1. Petitioner was convicted of the premeditated killing of Sergeant Aaron Britton. The facts were not in dispute; petitioner's sworn confession (GX 5) was admitted at trial without defense objection (Tr. 17, 216-218). The defense claim was that petitioner was guilty only of voluntary manslaughter (Tr. 279).

At 9:30 p.m. on December 5, 1987, petitioner was in his barracks room at Fort Eustis in Virginia. Sergeant Britton entered petitioner's room and accused petitioner of spreading the rumor that Sergeant Britton was dating Private Tracy Johnson (Tr. 165; GX 5).[2] Petitioner denied

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[1] The convening authority elected to refer petitioner to a court-martial that was not authorized to impose the death penalty (Tr. 10). *Manual for Courts-Martial, United States – 1984 (Manual),* Rules for Court-Martial 201(f)(1)(A)(iii) and 601(c). The minimum punishment for premeditated murder is confinement for life. Art. 118, UCMJ, 10 U.S.C. 918. Although a two-thirds vote was necessary to convict petitioner, a three-fourths vote was necessary to impose a sentence of life imprisonment, even though that penalty was mandatory under the UCMJ. Rule 1006(d), *Manual.* That difference is immaterial in this case, however, because four of the five panel members had to concur in the judgment regardless of whether a two-thirds or three-fourths majority vote requirement is applied.

[2] Sergeant Britton and Private Tracy Johnson were members of the same unit. Private Tracy Johnson testified that petitioner told her that he intended to tell the platoon sergeant about the relationship between her and Sergeant Britton (Tr. 207). Carrying on a relationship with a military subordinate could damage Sergeant Britton's professional reputation and could violate the Uniform Code of Military Justice under some circumstances. See *United States* v. *Clarke,* 25 M.J. 631 (A.C.M.R. 1987); *United States* v. *Stocken,* 17 M.J. 826 (A.C.M.R. 1984).

the charge. The incident ended with Sergeant Britton telling petitioner that if he continued to spread the rumor, they would "handle it like men" (Tr. 165-166, 167; GX 5).

Shortly thereafter, Sergeant Britton arranged for petitioner to be called out of the room purportedly to answer a telephone call (Tr. 171; GX 5). The lights in the hall outside the room were turned out as part of the plan (Tr. 171). After answering the phone, petitioner was attacked by Sergeant Britton, and perhaps Privates Mayrant and Conners (Tr. 171-173; GX 5). Petitioner and Sergeant Britton fell to the floor and wrestled until petitioner was able to break free (Tr. 172; GX 5). Sergeant Britton then went to the opposite end of the hall, while petitioner returned to his room (Tr. 135, 151, 172; GX 5).

By his own admission, petitioner was angry (GX 5). He "stopped for awhile" and thought to himself (*ibid.*). Then, after "look[ing] into the mirror and t[aking] a deep breath," he grabbed his survival knife and went to find Sergeant Britton (*ibid.*). Petitioner walked quickly up the hallway,[3] turning on lights and repeating, "I don't play that shit, they don't do that to me" and "I'm going to kill him" (Tr. 110, 125, 136, 152-154, 172). Specialist Allen stopped petitioner and suggested that they discuss the matter (Tr. 110-111). Petitioner replied, "no, I'm gonna get him" (Tr. 111).[4] Petitioner walked past Allen toward Sergeant Britton (*ibid.*). As he approached the sergeant, petitioner thrust his knife forward, piercing Sergeant Britton's heart and killing him (Tr. 112, 152-154; GX 9).

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[3] Petitioner walked approximately 66 feet to return to his room from the fight (GXs 1, 5). He traveled an additional 198 feet from his room to the point where he stabbed Sergeant Britton (GX 2B).

[4] Private Joyce Tucker had spoken with petitioner earlier in the day. She testified that petitioner had told her "something was going down in the unit tonight," and that "if anybody messed with him they would get it" (Tr. 150).

2. Seven potential panel members[5] were detailed to petitioner's court-martial (Tr. 27). One was challenged for cause by the government, since she had prior knowledge of the case (Tr. 87-88). Another was peremptorily challenged by the government (Tr. 89). The defense did not challenge any of the remaining members (Tr. 88-89).[6] The defense moved the trial judge to empanel six members to hear the case and to determine whether the verdict was unanimous (Tr. 91, 234-237, 320-322). The trial judge denied both motions (Tr. 91-92, 323-324).

ARGUMENT

In *Ballew* v. *Georgia*, 435 U.S. 223 (1978), the Court held that the Sixth and Fourteenth Amendments require that at least six persons serve on the jury in serious state criminal cases. In *Burch* v. *Louisiana*, 441 U.S. 130 (1979), the Court ruled that the verdict by such a six-person jury must be unanimous. Relying on *Ballew* and *Burch*, petitioner maintains that his conviction by a potentially nonunanimous five-member court-martial panel violates the Due Process Clause

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[5] All the court members were officers (Tr. 1). Petitioner did not exercise his right to request that one-third of the court members be from the enlisted ranks. Art. 25(c), UCMJ, 10 U.S.C. (& Supp. IV) 825(c). Under the circumstances of this case, such a request could not be denied. *Ibid.*

[6] The prosecution and defense are entitled to one peremptory challenge each as a matter of right. Art. 41, UCMJ, 10 U.S.C. 841; compare *United States* v. *Carter*, 25 M.J. 471 (C.M.A. 1988) (trial judge may award an accused additional peremptory challenges to ensure a fair trial). Had petitioner exercised his peremptory challenge in this case, the number of members would have been reduced to four. Because a general court-martial must have at least five members, Art. 16, UCMJ, 10 U.S.C. (& Supp. IV) 816, the exercise of a peremptory challenge by the defense would have required the convening authority to detail sufficient additional members to create a panel of at least five members.

of the Fifth Amendment.[7] That claim does not warrant review by this Court, for several reasons.[8]

1. There is no conflict among the circuits on the question presented by petitioner. The Court of Military Appeals has consistently rejected the contention that the court-martial system adopted by Congress is invalid under *Ballew* v. *Georgia, supra,* and *Burch* v. *Louisiana, supra,* on the ground that a defendant may be convicted by a five-member court-martial panel, or by the two-thirds vote of a panel of any size. *United States* v. *Mason,* 24 M.J. 127, 128 & n.* (C.M.A. 1987), cert. denied, No. 86-1935 (Oct. 9, 1987); *United States* v. *Hutchinson,* 17 M.J. 156, 156-157, 18 M.J. 281 (C.M.A.), cert. denied, 469 U.S. 981 (1984); see *United States* v. *McClain,* 22 M.J. 124, 128 (C.M.A. 1986); *United States* v. *Kemp,* 22 C.M.A. 152, 154, 46 C.M.R. 152, 154 (1973) (the Sixth Amendment cross-section requirement is inapplicable to court-martial panels). The decisions of that court are consistent with the decision of the only federal court of appeals to address this question in light of *Ballew* and *Burch*. *Mendrano* v. *Smith,* 797 F.2d 1538, 1544-1547 (10th Cir. 1986).

2. In addition, the decision below is also correct. The statutes governing the number of members on court-martial panels and the number that must concur to return a verdict do not offend either the Fifth or Sixth Amendments to the Constitution.

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[7] The Uniform Code of Military Justice does not provide a means of discovering the actual vote of the panel members. Thus, it is unknown whether petitioner was in fact convicted by a unanimous vote of the panel or by a vote of four to one.

[8] This Court has previously denied certiorari in several other cases presenting substantially the same question. *Mason* v. *United States,* cert. denied, No. 86-1935 (Oct. 19, 1987); *Delacruz* v. *United States,* cert. denied, No. 86-1675 (May 18, 1987); *Dodson* v. *United States,* cert. denied, No. 86-407 (Dec. 8, 1986); *Garwood* v. *United States,* cert. denied, 474 U.S. 1005 (1985); *Hutchinson* v. *United States,* cert. denied, 469 U.S. 981 (1984).

a. Petitioner seeks to impose on courts-martial the same requirements that Art. III, § 2, Cl. 3, and the Sixth Amendment impose in civilian cases. It is well settled, however, that the right to a jury trial guaranteed by those provisions does not apply to court-martial proceedings. *Ex parte Milligan,* 71 U.S. (4 Wall.) 2, 123 (1866); *Dynes* v. *Hoover,* 61 U.S. (20 How.) 65, 79 (1858).[9] The Fifth Amendment specifically exempts "cases arising in the land or naval forces" from the requirement of an indictment by a grand jury for serious crimes.[10] By drafting the Fifth Amendment in that manner, "the framers of the constitution, doubtless, meant to limit the right to trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan,* 71 U.S. (4 Wall.) at 123. As the Court explained in *Ex parte Quirin,* 317 U.S. 1, 39 (1942), neither Section 2 of Article III of the Constitution nor the Sixth Amendment requires a trial

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[9] See also *O'Callahan* v. *Parker,* 395 U.S. 258, 261 (1969), overruled on other grounds, *Solorio* v. *United States,* No. 85-1581 (June 25, 1987); *Reid* v. *Covert,* 354 U.S. 1, 19 (1957) (plurality opinion); *Whelchel* v. *McDonald,* 340 U.S. 122, 127 (1950); *Ex parte Quirin,* 317 U.S. 1, 40-41 (1942); *Kahn* v. *Anderson,* 255 U.S. 1 (1921); *Mendrano* v. *Smith,* 797 F.2d at 1544; *King* v. *Moseley,* 430 F.2d 732, 734 (10th Cir. 1970); *Branford* v. *United States,* 356 F.2d 876, 877 (7th Cir. 1966); *Owens* v. *Markley,* 289 F.2d 751, 752 (7th Cir. 1961); see *DeWar* v. *Hunter,* 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate the Sixth Amendment); see generally Van Loan, *The Jury, the Court-Martial, and the Constitution,* 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial and the Constitution: The Original Understanding,* 71 Harv. L. Rev. 293 (1957).

[10] Petitioner erroneously suggests (Pet. 10-11 n.4) that the exception for "cases arising in the land or naval forces" applies only when a case arises "in actual service in time of war or public danger." The latter phrase refers only to the "Militia" of the states, not to the "land or naval forces" of the United States. *Johnson* v. *Sayre,* 158 U.S. 109 (1895).

by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Accordingly, because petitioner had no Article III or Sixth Amendment right to a trial by a petit jury, he also had no right under those provisions to a unanimous vote by a jury composed of at least six persons.

b. Petitioner's claim fares no better under the Due Process Clause. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces" (Art. I, § 8, Cl. 14) and grants Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio* v. *United States,* No. 85-1581 (June 25, 1987), slip op. 12; see also *Burns* v. *Wilson,* 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the composition and voting procedures of a court-martial is entitled to special deference, not only because "[t]he constitution of courts-martial, like other matters relating to their organization and administration * * *, is a matter appropriate for congressional action" (*Whelchel* v. *McDonald,* 340 U.S. 122, 127 (1950) (citations omitted)),[11] but also because the practices at issue have been carried forward from the earliest days of our nation. See *Solorio* v. *United States,* slip op. 7-11.

The nation's first military law was the American Articles of War of 1776. 1 & 2 W. Winthrop, *Military Law and Precedents* 46, App. 961-971 (2d ed. 1920). Section 14,

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[11] See also, *e.g.*, *Rostker* v. *Goldberg,* 453 U.S. 57, 64-65 (1981) (the decisions of Congress are entitled to particular deference when they involve "Congress' authority over national defense and military affairs").

Art. 1, provided that at least 13 officers would serve on general courts-martial (*i.e.*, a president and 12 members). 5 J. Continental Cong. 800 (W. Ford ed. 1906); 1 & 2 W. Winthrop, *supra,* App. 967. In 1782, Congress substantially adopted the English practice for naval courts-martial of detailing five officers to a court-martial in a capital case and three in a noncapital case. 22 J. Continental Cong. 325 (G. Hunt ed. 1914). Four years later, when large numbers of desertions and an understaffing of officers had become a particularly acute problem for commanders at frontier outposts, Congress amended the American Articles of War to permit a quorum of five officers at a general court-martial and three officers at regimental courts-martial when 13 members could not be detailed "without manifest injury to the service." 30 J. Continental Cong. 145, 316 (J. Fitzpatrick ed. 1786); 1 & 2 W. Winthrop, *supra,* at 22-23, App. 972; Van Loan, *The Jury, the Court-Martial, and the Constitution,* 57 Cornell L. Rev. 363, 384-385 n.118 (1972). That language was merely advisory to the officer responsible for appointing the members of a court-martial, however, and his decision to select a small number of members was both lawful and conclusive. *Martin* v. *Mott,* 25 U.S. (12 Wheat.) 19, 34-35 (1827).[12]

Congress endorsed that practice throughout the nineteenth century and the early part of the twentieth century when revising the Articles of War. 1 & 2 W. Winthrop, *supra,* at 77, 159; American Articles of War of 1806, ch. 20, Art. 64, 2 Stat. 367, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 981-982; American Articles of War of 1874, Art. 75, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 992;

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[12] See also *Bishop* v. *United States,* 197 U.S. 334, 339-340 (1905); *Mullan* v. *United States,* 140 U.S. 240, 245 (1891) (convening officer's determination that trial by members junior in rank to the accused could not be avoided was proper).

American Articles of War of 1916, ch. 418, Art. 43, 39 Stat. 657. In the aftermath of World War II, Congress replaced the Articles of War with the Uniform Code of Military Justice. In so doing, Congress retained the requirement of a quorum of five members for general courts-martial, as well as the convening authority's discretion to detail a greater number of panel members, the system that exists today. Art. 16, UCMJ, 10 U.S.C. (& Supp. IV) 816.

History also shows that unanimity has never been a feature of court-martial proceedings.[13] The American Articles of War of 1776, like their predecessor, the British Articles of War,[14] required only a simple majority vote to convict a defendant, and a two-thirds majority to sentence him to death. Articles of War of 1776, § 14, Art. 5, *reprinted in* 5 J. Continental Cong. 801 (W. Ford ed. 1906); 1 & 2 W. Winthrop, *supra,* at 377, App. 968; A. Macomb, *A Treatise on Martial Law and Courts-Martial* 144 (1809). Congress thereafter repeatedly endorsed similar majority vote requirements in statutes passed in 1799, 1800, 1806, and 1874.[15] Throughout the nineteenth century, a majori-

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[13] During the Revolution, the Continental Congress adopted the British naval regulations for use by the Continental Navy. The British regulations provided for courts-martial similar to the general courts-martial under the British Articles of War, which required only a simple majority to convict and sentence a defendant. Van Loan, *supra,* 57 Cornell L. Rev. at 382 & n.102.

[14] The British Articles of War required a vote of 9 of 13 court-martial members to impose the death penalty. 1 & 2 W. Winthrop, *supra,* App. 943, § 15, Art. VIII. The Articles of War did not specify the number of votes necessary to convict a defendant at a general court-martial or to impose any sentence other than death. The Articles of War, however, provided that inferior courts-martial "shall give Judgment by the Majority of Voices." 1 & 2 W. Winthrop, *supra,* App. 943, § 15, Art. XII; see R. Scott, *The Military Law of England* 131 (1810).

[15] Act of Mar. 2, 1799, ch. 24, 1 Stat. 709 (An Act for the Government of the Navy of the United States); Act of Apr. 23, 1800, ch. 33,

ty vote of the panel members was sufficient to convict a defendant of a noncapital crime, with a two-thirds vote sufficient to impose capital punishment. 1 & 2 W. Winthrop, *supra,* at 377; *Stout* v. *Hancock,* 146 F.2d 741, 742-743 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945).

Early in the twentieth century, Congress modified the voting requirements for Army courts-martial, requiring a unanimous vote to impose the death penalty or to convict a defendant of a crime carrying a mandatory death penalty. Act of June 4, 1920, ch. 227, Art. 43, 41 Stat. 795-796; *Stout* v. *Hancock,* 146 F.2d at 741-743. For all other crimes, conviction still required only a two-thirds majority. At the same time, the voting requirements for courts-martial in the Navy were left untouched. Thus, only a simple majority was necessary to convict a sailor, and a two-thirds majority to impose the death penalty. See H.R. Rep. 491, 81st Cong., 1st Sess. 26, 491, 74 (1949). When considering the UCMJ following World War II, Congress rejected the suggestion that the unanimous vote requirement be extended to noncapital crimes,[16] and instead adopted Article 52 of the UCMJ, 10 U.S.C. 852, in substantially its present form.

Congress has modified the Code on more than 20 occasions since Articles 16 and 52 were enacted, but it has never changed the composition or voting procedures for noncapital cases tried by a court-martial.[17] In sum, it is clear

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§ 1, Art. 41, 2 Stat. 51 (An Act for the Better Government of the Navy of the United States); the American Articles of War of 1806, ch. 20, Art. 87, 2 Stat. 369, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 984; the American Articles of War of 1874, Art. 96, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 994.

[16] See *Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 565, 1081-1082 (1949).

[17] In 1984, Congress enacted amendments to the UCMJ to coincide with proposed changes to the *Manual for Courts-Martial.* Concur-

that the five-member, two-thirds majority vote procedures in Articles 16(1)(A) and 52(a)(2) of the UCMJ, 10 U.S.C. (& Supp. IV) 816(1)(A) and 852(a)(2), represent the longstanding and considered judgment of Congress and the President on the proper balance to be struck between the rights of an individual serviceman and the special needs of the armed forces.

That judgment is also reasonable. The essential function of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11, 17 (1955). When servicemembers are diverted from that function by the need to serve as panel members, "the basic fighting purpose of armies is not served." *Ibid.* Congress therefore has determined that the diversion of resources necessary to conduct the retrials that would result from a unanimous verdict requirement was too high a price to pay in terms of lost military preparedness. Accordingly, Congress provided for only one trial, at which a two-thirds majority vote would decide the outcome.

That system does not exclusively favor the prosecution. The rule that no retrials are permitted in the military if there is a "hung jury" provides a defendant with "a significant recompense" for the disadvantages of a nonunanimous verdict. *Mendrano* v. *Smith,* 797 F.2d at 1546. Moreover, as a safeguard against an inaccurate verdict by a court-martial panel, the military courts have required the prosecution independently to prove the defendant's guilt before a court of military review. The standard of review applied by a court

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rently, the President, acting pursuant to his rule-making authority, promulgated the current Manual, which significantly changed courts-martial practice. In 1986, the President again amended the Manual by requiring that findings of guilty to premeditated murder in capital cases be unanimous. Rule 1004, *Manual.* Notwithstanding these revisions, neither the President nor Congress required unanimity in other situations.

of military review to determine whether the evidence is sufficient to support the defendant's conviction is substantially different from, and more generous to, military defendants than the standard employed by civilian appellate courts. A civilian appellate court does not inquire whether *it* believes that the evidence is sufficient to prove the defendant's guilt beyond a reasonable doubt, but instead only determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia,* 443 U.S. 307, 319 (1979) (emphasis in original). By contrast, a court of military review must independently review the record and be convinced of the correctness of the court-martial panel's findings, including its ultimate finding that the accused is guilty, before the findings may be upheld. Art. 66(c), UCMJ, 10 U.S.C. 866(c).[18]

In addition to the more exacting standards of appellate review, the military defendant enjoys greater rights than his civilian counterpart at the pretrial and post-trial stages of the proceedings. No charge may be referred to a general court-martial for trial without an impartial investigation into the evidence supporting the charge. Art. 32, UCMJ, 10 U.S.C. 832. This procedure includes the right of the accused to be represented by counsel. A convening authority may not refer a charge to a general court-martial for trial

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[18] A court of military review may affirm "only such findings of guilty * * * as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 866(c). Although nothing in the text of the statute or its legislative history suggests that the courts of military review must independently apply the "beyond a reasonable doubt" standard to the record when reviewing the sufficiency of the evidence (see *Jackson* v. *Taylor,* 353 U.S. 569, 577 & n.8 (1957)), the military courts have read that standard into the act. *E.g., United States* v. *Palenius,* 2 M.J. 86, 91 n.7 (C.M.A. 1977).

without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. (Supp. IV) 834(a). After trial, the convening authority receives a report of the trial, and he may disapprove findings of guilt or reduce the sentence as a matter of clemency or as a prerogative of command. Art. 60, UCMJ, 10 U.S.C. (& Supp. IV) 860. To assist the convening authority, the accused has the right to submit legal arguments and other matters with respect to the findings and sentence. *Ibid.* See generally, *United States* v. *Boland,* 1 M.J. 241 (C.M.A. 1975); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant,* 22 Me. L. Rev. 105 (1970). In light of these special protections against the risk of inaccurate verdicts in the military justice system, petitioner has not made the "extraordinarily weighty" case necessary to overcome the longstanding congressional judgment that the court-martial system satisfies due process requirements. *Middendorf* v. *Henry,* 425 U.S. 25, 44 (1976).

c. The lead opinion in *Ballew* v. *Georgia, supra,* relied heavily on empirical studies of the group dynamics of juries in ruling that a six-person jury was required. 435 U.S. at 231-243 (opinion of Blackmun, J.). Much the same reasoning formed the basis for the ruling in *Burch* v. *Louisiana* that a six-person jury must be unanimous. 441 U.S. at 138. Petitioner argues (Pet. 8-9) that the studies considered in *Ballew* should also inform the decision here. Those studies all involved civilian juries, however, and there are no comparable studies addressing the dynamics of court-martial panels. In light of the important functional and compositional differences between civilian juries and court-martial panels, the studies on which this Court relied in *Burch* and *Ballew* are not immediately applicable to the military setting. *United States* v. *Guilford,* 8 M.J. 598, 601-602 (A.C.M.R. 1979), petition denied, 8 M.J. 242 (C.M.A.

1980).[19] The question whether studies of the type considered in *Ballew* are sufficiently compelling, when applied to the military setting, to justify a change in court-martial procedures is one that should be left to Congress.

3. Petitioner suggests (Pet. 4, 11-12) that this Court's recent decision in *Solorio* v. *United States, supra,* requires a different result. He argues that the procedures at issue may have been permissible before *Solorio*, but are no longer justified now that the Court has altered the service-connection restriction on courts-martial. That argument is misdirected.

The *Solorio* decision did not abolish the service-connection requirement; it merely reaffirmed the traditional principle that an offense is sufficiently service-connected for purposes of court-martial jurisdiction if the defendant is a servicemember at the time of the commission of the crime and at trial. The effect of *Solorio* is not to convert the military justice system into one closely analogous to a

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[19] In *Burch*, the Court concluded that juries must have at least six members, in part "to provide a fair possibility that a cross section of the community would be represented." 441 U.S. at 135, citing *Williams* v. *Florida*, 399 U.S. 78, 100 (1970). That goal is inapplicable to courts-martial. The members of a civilian jury are selected at random to represent a cross-section of the community. By contrast, the members of a court-martial panel are deliberately chosen on the basis of their qualifications to sit as panel-members. Art. 25, UCMJ, 10 U.S.C. (& Supp. IV) 825. The members of a court-martial panel are drawn exclusively from the same profession as the defendant, and they have a specialized knowledge of its workings and expectations. Accordingly, the failure randomly to select a court-martial panel from a pool of all servicemen, including enlisted personnel with the same rank as the defendant, is not unconstitutional. *DeWar* v. *Hunter*, 170 F.2d at 997 (panel composed exclusively of officers to try an enlisted man does not violate Sixth Amendment); *United States* v. *McClain*, 22 M.J. at 128 (Sixth Amendment cross-section requirement inapplicable to court-martial proceedings); see *Mendrano* v. *Smith*, 797 F.2d at 1544-1547.

civilian system, in which Fifth and Sixth Amendment principles apply just as they do in the civilian courts. *Solorio* simply restored court-martial jurisdiction to a class of cases, not covered during the 18-year period following *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), consisting of certain cases in which the crimes were committed by servicemembers off the premises of military bases. The rules regarding the number and voting requirements of court-martial panels were adopted prior to the Court's decision in *O'Callahan*, not during the period between *O'Callahan* and *Solorio*. Moreover, there is no historical or logical connection between the service-connection restriction, as applied in *O'Callahan*, and the court-martial rules at issue here. The decision in *Solorio* therefore has no effect on the validity of those rules in the military justice system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

NORMAN G. COOPER
Col., JAGC, USA

GARY F. ROBERSON
Lt. Col., JAGC, USA

PATRICK D. O'HARE
Capt., JAGC, USA

GARY L. HAUSKEN
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency

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